United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1806

To be Argued by
Miles F. McDonald

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

EXXON CORPORATION,

Plaintiff-Appellant

-against-

THE CITY OF NEW YORK, ENVIRONMENTAL PROTECTION ADMINISTRATION OF THE CITY OF NEW YORK and ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION ADMINISTRATION OF THE CITY OF NEW YORK,

Defendants-Appellees

GETTY OIL CO., (Eastern Operations), INC., GULF OIL CO. - U.S. MOBIL OIL CORPORATION and SUN OIL COMPANY OF PENNSYLVANIA,

Plaintiffs-Appellants

-against-

THE CITY OF NEW YORK, HERBERT ELISH, Environmental Protection Administrator of the City of New York, and THE ENVIRONMENTAL PROTECTION ADMINISTRATION OF THE CITY OF NEW YORK,

Defendants-Appellees.

- x

BRIEF OF PLAINTIFFS-APPELLANTS GETTY OIL CO. (Eastern Operations), INC., GULF OIL CO. - U.S., MOBIL OIL CORPORATION and SUN OIL COMPANY OF PENNSYLVANIA IN ANSWER TO SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLEES

SHEA GOULD CLIMENKO & KRAMER
Attorneys for Plaintiffs-Appellants
GETTY OIL CO., (Eastern Operations), INC., GULF OIL CO. - U.S. MOBIL OIL CORPORATION and SUN OIL COMPANY OF PENNSYLVANIA
330 Madison Avenue
New York, New York 10017

Jesse Climenko
Miles F. McDonald
Of Counsel

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

EXXON CORPORATION,

Plaintiff-Appellant

v.

THE CITY OF NEW YORK, ENVIRONMENTAL PROTECTION ADMINISTRATOR OF THE CITY OF NEW YORK and ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION ADMINISTRATION OF THE CITY OF NEW YORK,

Defendants-Appellees

GETTY OIL CO., (Eastern Operations), INC., GULF OIL CO.-U.S. MOBIL OIL CORPORATION and SUN OIL COMPANY OF PENNSYLVANIA,

Plaintiffs-Appellants

v.

THE CITY OF NEW YORK, HERBERT ELISH, Environmental Protection Administrator of the City of New York, and THE ENVIRONMENTAL PROTECTION ADMINISTRATION OF THE CITY OF NEW YORK,

Defendants-Appellees.

BRIEF OF PLAINTIFF-APPELLANTS GETTY OIL CO. (Eastern Operations), INC., GULF OIL CO.-U.S., MOBIL OIL CORPORATION and SUN OIL COMPANY OF PENNSYLVANIA IN ANSWER TO SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLEES.

POINT I

THE ADMINISTRATOR HAS PROPERLY AND VALIDLY PROMULGATED THE FUEL AND FUEL ADDITIVE CONTROLS PRESENTLY BEING CHALLENGED HAVING GIVEN DUE CONSIDERATION TO ALL APPROPRIATE EVIDENCE AND ALTERNATE MEANS OF ACHIEVING CONTROL OF LEAD PARTICULATES UNDER 42 U.S.C.A. §1857f-1, AS REQUIRED BY §1857f-6(c)(2)(A).

Neither §1857f-6(c)(2)(A) nor §1857f-1 obligates the Administrator to prescribe specific lead emission standards for new vehicles as a condition precedent to the regulation of dangerous lead additives in fuel. With respect to vehicles already "in use" the Administrator is neither required nor authorized to prescribe vehicle emission standards as an alternative to the regulation for health purposes of additives in fuels.

> "The Clean Air Act does not authorize EPA to establish national emission standards on in-use vehicles."

Administrator's explanation of new regulations, 38 Fed. Reg. 33737 (1973).

On December 6, 1973 the Administrator of the EPA promulgated regulations in exercise of his power under §211(c)(1) of the Clean Air Act, 42 U.S.C.A. §1857f-6c, to control fuel or fuel additives that endanger the public health, having previously, on January 14, 1973, promulgated regulations to protect the operation of anti-pollution devices installed in motor vehicles by requiring one grade of lead-free gasoline. The defendant City has urged that the regulations of December 6, 1973, which originally appeared at 38 Fed. Reg. 33734 (1973) and are codified 40

C.F.R. §§80.1 et seq., are invalidly promulgated and "void ab initio" for allegedly failing to follow the proviso to the fuel-regulating power that:

> "(2)(A) No fuel, class of fuels, or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (A) of paragraph (1) except after consideration of all relevant medical and scientific evidence available to him, including consideration of other technoligically or economically feasible means of achieving emission standards under section 1857f-1 of this title." 42 U.S.C.A. §1857f-6c(c)(2)(A)

Specifically, the City has observed, quite correctly, that the Administrator is instructed to consider, before issuing fuel additive controls, "other . . . means of achieving emission standards under section 1857f-1." The City also correctly observes that under §1857f-1 the Administrator is empowered to prescribe standards for the emission of air pollutants adjudged to endanger public health, although the City fails to point out that such standards may only be imposed on "new motor vehicles." The City concludes, erroneously we believe, that if the Administrator has not imposed a specific emission standard for "in use" vehicles for a specific pollutant, here lead, which he has determined to constitute a hazard to the public health, he is constrained from attacking the problem by ordering the omission of the additive under §1857f-6c(c)(2)(A).

Such a narrow, restrictive reading of the 6c(c)(2)(A) proviso, which merely attempts to set out relevant considerations to guide the Administrator in reaching a decision to control

offending fuels, is an unwarranted attempt by the City to cause the tail of the statute to 'wag the dog' and thereby obstruct the implementation of uniform regulations urgently needed in the interest of public health. The paramount objective of these provisions is manifestly to create a practical apparatus for the expeditious formulation and implementation of regulations to solve a national health problem of major importance and not to create a statutory maze that blocks the most effective avenues to solutions. That the Administrator did consider all the criteria required by §1857f-6c(c)(2)(A) proviso and reached his decision on the technological evidence before him, is evident from the December 6, 1973 regulations themselves. It would be pointless and wasteful to promulgate lead emission standards for new vehicles under §1857f-1, since pollution from "on the road" vehicles would not be reached, and new vehicles would soon require now-available lead-free fuels for the proper operation of anti-pollution devices coming into wide-spread use. The present recession and the problems of inflation make the pollution caused by in-use vehicles a continuing problem due to the serious drop in new car sales and the longer use of currently in-use vehicles.

On January 10, 1973 the Administrator issued a notice of proposed rule-making at 38 Fed. Reg. 1258 (1973) in which he outlined his considerations in formulating the proposed regulations (which are substantially similar to the regulations eventually

promulgated.) There he explains his determination that, for the reasons stated, the lead emission problem could not feasibly be attacked through the alternative of imposing emission standards under §1857f-1:

> "The Administrator has considered whether it would be more economically and technologically feasible to provide for the protection of public health by means of a new vehicle emission standard for lead particles than by means of the proposed reduction of gasoline lead content. It is considered unlikely that new motor vehicles could be equipped with lead emission control devices prior to the 1975 model year. Beginning in that model year, vehicles will be equipped with catalytic emission control systems which are rendered ineffective by lead emissions, and all evidence available to the Administrator indicated that lead trap devices adequate to protect the catalysts will not be available by 1975. Furthermore, the Administrator does not have authority to prescribe a lead emission standard applicable to other-than-new vehicles so that even a zero lead emission standard could be applied to new motor vehicles only. Older vehicles would continue to use leaded gasolines. Accordingly, the Administrator has determined that providing for the protection of public health by means of a new motor vehicle emission standard for lead is not feasible." 38 Fed. Reg. at 1259-60 (1973)

The Administrator's commentary accompanying the final promulgation of the regulations, appearing in December at 38 Fed. Reg. 33737 (1973) again demonstrates that the Administrator was fully aware of his obligation to consider dealing with the problem through setting new vehicle emission standards, weighed that alternative against the route of direct control of fuel content, and decided that the latter presented the only practical solution to the health hazard as appears from the following statement contained therein.

"Before prescribing regulations based on public health consideration the Administrator must consider 'other technological or economically feasible means of achieving emission standards under section 202.' Thus, if EPA determined that a reduction of lead emissions from motor vehicles is necessary for protection of public health or welfare, the feasibility of achieving such a reduction under section 202 (new motor vehicle emission standards) must be considered.

The primary alternative to the use of lead additive regulations to achieve reduction in lead emissions would be to impose a lead emissions standard which would result in the installation of 'lead-traps' on motor vehicles. The possibilities of incorporating this alternative, however, are limited by the existing legal and technical realities.

EPA does have the authority to impose a lead emissions standard on new vehicles which would result in the use of lead traps. The earliest that such a regulation could be imposed, however, would be the 1976 model year. Most motor vehicle manufacturers are expected to use lead sensitive emissions control systems to meet the Federal emissions standards which are applicable to new vehicles in 1976. Lead traps cannot adequately protect these systems because they are not capable of trapping all of the lead emitted. Lead-free gasoline will be required in most new vehicles based on the information now before the Agency. . . . Accordingly, the use of lead traps is relevant principally with regard to in-use vehicles. . . . Nevertheless, the Agency is continuing to study the feasibility of using traps on new vehicles in the future.

The Clean Air Act does not authorize EPA to establish national emission standards on in-use vehicles. Since lead traps cannot be used successfully on the vast majority of new vehicles and the Agency is legally incapable of requiring them on all in-use vehicles, the use of lead traps is really not a feasible alternative at this time in the Administrator's judgment.

Despite the legal authority obstacle EPA has examined the technological capabilities and costs of lead traps and has determined the regulation of lead additive use is the preferable method of controlling lead emissions."

It would be sheer nonsense to require the Administrator to perform the fruitless exercise of setting, upon empirical evidence, a specific emission standard for new vehicles which he did not intend to impose merely to serve as a predicate for control of fuel to be utilized for in-use vehicles only. Certainly, Congress' intent in enacting these provisions was to avoid, not add, delaying and wasteful steps in reaching solutions. The Administrator's exercise of discretion is clearly in conformity with the statutory guidelines and may not be challenged on that basis.

POINT II

THE LEGISLATIVE HISTORY DOES NOT, AS THE CITY CONTENDS, SUPPORT THE VIEW THAT EMISSION STANDARDS FOR A HARMFUL ADDITIVE MUST BE PROMULGATED UNDER §1857f-1 PRIOR TO THE CONTROL OF THAT ADDITIVE UNDER §1857f-6c.

The City, in its brief, states that the legislative history of the fuel regulation provisions, §1857f-6c, "fully supports" its conclusion that the establishment of emission standards for new vehicles under §1857f-1 is a predicate to any regulation of dangerous fuel additives by the Administrator. The City's brief, while not actually quoting any supportive material, does inform us that

> Representative Staggers, the floor manager of the House version of the Clean Air Act Amendments of 1970, explained that gasoline lead additive controls could not be promulgated before findings were made regarding lead emission standards established pursuant to 42 U.S.C. §1857f-1.

Supplemental Brief of Defendant-Appellees, p. 2. We are cited to 116 Cong. Rec. 19229-30 (June 10, 1970) for the alleged explanation.

A close reading of the cited pages does not disclose anything approaching the alleged explanation. Perhaps what the City characterizes as an "explanation" of its central point is the passage where Rep. Staggers, responding to persistent questioning by an opponent of the bill, states that regulation of additives must be based on facts, rather than suppositions, indicating harmfulness.

> MR. WAGGONER: Then the gentleman is saying to me, Mr. Chairman, that if information already exists or they believe they have that information which will prove that lead in itself in gasoline is harmful, whether they are right or not. . . .
>
> MR. STAGGERS: It is not based on belief. This says specifically that it is based upon specific findings.

In course of making this point, Rep. Staggers does read into the record a provision resembling the ultimately enacted §1857f-6c (c)(2)(A) proviso, which requires that fuel controls be based on "specific findings derived from relevant medical and scientific evidence" including a finding that it is not otherwise feasible to achieve emission standards established under the new vehicle emission standards provision. This latter provision was not discussed or explained by Rep. Staggers but only read as part of a larger provision the Congressman was citing to make the very elementary point that the formulation of regulations was to be

guided by factual findings, as opposed to "beliefs". Furthermore, the provision Rep. Staggers read in was, in its final, enacted form, softened, so that the Administrator now need not "find" that means other than fuel control are technologically not "feasible", but need only "consider" other feasible means of achieving the objective of elimination of the health hazard. Neither provision, of course, contains language barring action by the Administrator if emission standards for new vehicles have not, for some reason, been issued.

POINT III

THE DEFENDANT CITY IS PRECLUDED FROM CHALLENGING THE VALIDITY OF THE FUEL REGULATIONS BY §§1857h-5 (b)(1) and (2), WHICH PROVIDE FOR JUDICIAL REVIEW ONLY IN PROCEEDINGS BEFORE A SPECIFIED COURT WITHIN THIRTY DAYS OF PROMULGATION OF THE CONTESTED REGULATIONS

Section 1857h-5(b)(1) establishes a framework whereby petitions for review of the Administrator's regulations must be filed within 30 days of the promulgation date. The defendant City did not comply with this procedure in objecting to the regulations under dispute. In seeking a judicial enquiry into their validity at this belated date, the City urges contravention of a statutory scheme clearly designed to bring certainty and finality to the issuance of regulations that may require major commitments of resources by private industry.

Subsection (b)(2) expressly warns parties tempted to procrastinate that a court will not adjudicate arguments attacking the validity of the regulations in subsequent "civil or criminal proceedings for enforcement." The City makes the argument that because the instant proceeding is not one for enforcement, it must follow that review may be had, notwithstanding the fact that a petition for review could have been timely brought under subsection (b)(1) and was not.

Assuming arguendo that the present action is not a proceeding for "enforcement" within the meaning of subsection (b)(2), the City's contention that a validity issue may be raised in all other types of proceedings must be rejected. Such a reading would badly cripple the Congressional purpose to endow the actions of the Administrator with a substantial degree of definitiveness and finality.

The same policy-frustrating argument offered here by the City was made and rejected by the court in Getty Oil Company (Eastern Operations) v. Ruckelshaus, 342 F. Supp. 1006 (D. Del. 1972). There the plaintiff, Getty, sought injunctive and declaratory relief against a compliance order issued by the EPA, questioning, inter alia, the validity of the Administrator's regulations. Like the City here, "Getty filed no review action under Section 307 [42 U.S.C.A. §1857h-5(b)] within the allotted 30 days," 342 F. Supp. at 1013, but plaintiff similarly contended that the question of validity could be raised because the parties were not

involved in an "enforcement proceeding." The court answered the argument thusly:

> While paragraph (2) quoted above refers only to enforcement proceedings, it clearly evidences a congressional intent that matters which can be raised in a Section 307 proceeding shall not be litigated elsewhere. Accordingly, this Court cannot review any question which Getty could have raised in such a proceeding. Id.

On appeal the holding of the district court on this issue was fully endorsed.

> Getty was in the wrong court by virtue of section 307 of the Act. . . . If Congress specifically designates a forum for judicial review of administrative action, such a forum is exclusive, and this result does not depend on the use of the word "exclusive" in the statute providing for a forum for a judicial review. 467 F.2d 349, 356 (3rd Cir. 1972); cert. den. 409 U.S. 1125 (1973)

The views of the district and appellate courts in Getty v. Ruckelshaus apply with equal force in the instant case. By failing to test the fuel controls in the method prescribed by the statute, the City is foreclosed from challenging them in the context of this suit. Should this court hold to the contrary, it would open a Pandora's box from which would flow a miasma of litigation which may result in conflicting requirements - a quandary Congress sought to avoid by conferring exclusive jurisdiction on the Court of Appeals for the District of Columbia under §1857h-5(b)(1).*

---

* The City inserts in a footnote the suggestion that the 30-day review provision applies only to petitions for review attacking the "substance" of the regulations, rather than the procedural regularity. Of course, the provision itself does not limit the scope of review to questions of "substance", but rather opens to review the "action of the Administrator in promulgating. . . ." Surely, these grounds are broad enough to include attacks upon procedure - how the Administrator acted. The suggestion of the City that the scope of review is any less encompassing is an unsupported and, indeed, unsupportable attempt by the City to escape the force of the 30-day review procedure with which it failed to comply.

POINT IV

THE INSTANT PROCEEDING IS, IN EFFECT, AN ENFORCEMENT PROCEEDING. HENCE, A JUDICIAL REVIEW OF THE ADMINISTRATOR's ACTION IS BARRED BY THE EXPRESS LANGUAGE OF 42 U.S.C.A. § 1857h-5(b)(2).

The Court's attention is respectfully called to the fact that Section 1857h-5(b)(2) declares that

> Action of the Administrator with respect to which review could have been obtained under paragraph 1 [providing for petitions for review within 30 days of promulgation] shall not be subject to judicial review in civil or criminal proceedings for enforcement.

The instant proceeding is, in the broadest sense, one for enforcement of the Administrator's action. The plaintiffs seek a judgment that the federal regulations take precedence over conflicting regulations promulgated by the City. Plaintiffs assert the fundamental position that the federal regulations have force and effect over parties potentially affected by two inconsistent regulatory schemes.

It is true that the provisions under which the fuel controls are promulgated provide for certain penalties and for exaction of the penalties through suits in the name of the United States. §1857f-6c(d). However, the penalty provision is not denominated an "enforcement proceeding," and the latter phrase is not defined or related to specific provisions where it first appears in §1857h-5(b)(2).

The instant action is in substance a proceeding to enforce by injunction the prohibition against enforcement by a state (or

political subdivision thereof) of regulations not identical to federal regulations. §1857f-6c(c)(4)(A). The provision prohibiting judicial review in such enforcement proceedings expressly forecloses the issue of validity the City raises here.

CONCLUSION

The incongruity of the City's position as stated in this supplemental brief is obvious. For three years the City has loudly proclaimed the serious health hazard of lead particulates resulting from automobile emissions and has argued that the hazard is so great that the plaintiffs should be denied the benefits of a temporary injunction during the course of this litigation. Now when the federal government has recognized the hazard and steps have been taken by the federal administrator to remedy the condition on a national basis and in the only feasible manner, the City, for narrow reasons of self-interest, seeks to destroy the only practical solution to this important national health problem. The City's grasp at this weak straw at this late date clearly demonstrates their absence of faith in the arguments previously presented. The supplemental brief of the City of New York adds nothing to the arguments previously presented. Accordingly, the local regulations clearly have been preempted by federal regulations. The decision of the court below, denying plaintiffs'

motion for summary judgment, should therefore be reversed and this case should be remanded to the district court for an order granting plaintiffs' motion for summary judgment on the first cause of action and severing the second cause of action.

Respectfully submitted,

SHEA GOULD CLIMENKO & KRAMER
Attorneys for Plaintiffs-Appellants
Getty Oil Co. (Eastern Operation), Inc., Gulf Oil Co. - U.S., Mobil Oil Corporation, and Sun Oil Company of Pennsylvania
330 Madison Avenue
New York, N.Y. 10017

Of Counsel:

Jesse Climenko
Miles F. McDonald

2 COPIES RECEIVED

NOV 26 1974

SHEARMAN & STERLING

ATTORNEYS FOR Pitt-Opt